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with the regards of
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BILLS, NOTES, AND CHECKS

PART II

INSTRUCTION PAPER

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AMERICAN SCHOOL OF CORRESPONDENCE

CHICAGO ILLINOIS

U.S.A.

LAW OF BILLS, NOTES, AND CHECKS

PART II

CHAPTER VI

CONSIDERATION

§ 49. **Value or Valuable Consideration.** Under N. I. L. § 2 they mean the same thing. This is one of those terms of the common law that unfortunately were imposed upon the law merchant by the courts of England at a time when English lawyers were ignorant of the law merchant and were full of the mistaken notion that the common law was the perfection of reason and contained everything; therefore, the duty of the courts was not to make law but to find out what was already contained in the law if it could only be found. As Bigelow says in the "Laws of Bills, Notes and Cheques", page 5:

"The michief lies in the mistaken notion implied, that the law merchant is a sort of poor relation of the common law, or rather that it is a dependent of the common law, subject to it wherever its own language is not plain. Such instances, in other words, overlook the fact that the law merchant is an independent, parallel system of law, like equity or admiralty. The law merchant is not even a modification of the common law; it occupies a field over which the common law does not and never did extend."

It is further defined in § 51 as "any consideration sufficient to support a simple contract." It consists—

"In some legal right, by way of interest, profit or bene-

fit, accruing to the one party, or some loss of legal right, by way of forbearance, damage or detriment suffered by the other. It is not necessary that there should be *quid pro quo* or benefit of any kind, to make one a holder for value; detriment (in respect of legal right) is enough" (Bigelow, p. 242).

And he says further on the same page,

"The consideration must be valuable; it is not enough that it is merely 'valid', 'good', or 'meritorious' so as to confirm the title, as in the case of gift. All the authorities agree in that proposition. It may be, indeed, that one to whom a negotiable instrument has been given may recover upon it, and not because the present owner is himself a holder for value".

§ 50. Common-Law Consideration. It is most unfortunate that in treating of this subject we must, whether we wish to or not, be led off into what constitutes common-law consideration, because decisions of the courts for centuries compel us to do so. But the student is earnestly asked to bear always in mind that upon principle the true question always is, in bills and notes: What is the custom of merchants? "No rule touching the law merchant can permanently hold place which fetters or is opposed to custom; for it must rest upon essentially unsound theory".[1] In the further consideration of this important and difficult part of our subject let us follow the course taken by Dean Ames in his Index Digest to his "Cases on Bills and Notes".

Value is Either Money or Money's Worth. The surrendering of negotiable securities is the giving of value.[2] One who gives his own signature to a negotiable instrument, gives value.[3]

So one gives value who extinguishes a debt by making it

[1] Bigelow, p. 247.

[2] Bk. of Salina v. Woodcock, 21 Wend. (N. Y.) 499; 1839; Mohawk Bk. v. Corey, 1 Hill (N. Y.) 513, 1841; Ayrault v. McQueen, 32 Barb. (N. Y.) 305, 1860; Outhvite v. Porter, 13 Mich. 533, 1865.

[3] Williams v. Smith, 2 Hill (N. Y.) 301, 1842; Humphrey v. Vertuer, Green Ch. (Miss.), 251, 1842; Stotto v. Byers, 18 Iowa 303, 1864; Wells v. Chapman, 81 Ill. 137, 1876.

in the instrument taken for it. Bk. of Sandusky v. Scoville, 24 Wend. (N. Y.) 115, 1840; Bk. of St. Albans v. Gilliland, 23 Wend. (N. Y.) 311, 1840; in which Nelson, C. J. said, "We have frequently held that receiving a note for a *precedent debt* is not receiving it *for value* within mercantile usage, 20 Johns, R. 637; 12 Wendell 487; 14 *id.* s. c. 57; 16 *id.* 659; *see also* 13 East, 135, (u); 9 Barn & Cross, 208; Byles on Bills of Exch. 20; but here was something more. The note was taken *in satisfaction of the indebtedness, without recourse, and the debt discharged,* importing that it was received at the risk of the holder, and that unless available in his hands, he loses the demand. He has, therefore, trusted to the credit of the papers as effectually as if he had parted with the securities of third persons at the time, having discharged the personal responsibility of the original debtors.[4]

An agreement to forbear suit has also been held to be "value," it being the surrender of a right, and, therefore, a "detriment" in the legal sense of the word. See Oates v. Nat. Bk. 100 U. S. 239, 1879; where it was held that a creditor who, before its maturity, accepts a negotiable note, so indorsed that he becomes a party thereto, as collateral security for a pre-existing debt, in consideration of an extension of time granted to the debtor, is, according to the law merchant, a holder for value, and his rights as such are not effected by equities between antecedent parties, of which he had no notice.

The Supreme Court took occasion in this decision to affirm the doctrine already established in that court in Swift v. Tyson, 16 Peters 1, 1842; Carpenter v. Prov. Ins. Co. do. 495, 1842; and Watson v. Tarpley, 18 How. 517, 1855, that is, that while the Federal courts must regard the laws of the several States and their construction by the State courts (except when the constitution, treaties, or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States,

[4] See also Brown v. Leavitt, 31 N. Y. 113, 1865; and the cases cited in note 7 to this case, 1 Ames' Cases on Bills and Notes, 668.

in cases where applicable, they are not bound by the decision of those courts upon questions of general commercial law. Here is recognition by the highest court of the land that the law merchant so far as applicable in cases involving bills and notes, is no part of the common law of the States. In reality it is a part of international law, the custom of merchants not being limited exclusively to England and the United States.

Further, a negotiable instrument taken in conditional payment of a debt is "value," because the creditor's right to sue upon the debt is suspended.[5] The opposite view may be found in a host of cases given by Dean Ames, 1 Cases on Bills and Notes, 667, 668, u. 1.

And if a negotiable instrument is taken merely as collateral security for a debt, it is taken for value. The cases to this effect may be found in 1 Ames, Cases on Bills and Notes, 650, note. The leading case to the contrary is Bay v. Codington, 5 Johns Ch. (N. Y.) 54, 1821, which is still followed in New York, although it is not in accord with the customs of merchants nor with § 51 of the N. I. L.

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

This would seem to be explicit enough, yet nearly fifty cases under this section have already arisen in the States that have adopted this law. The courts of New York have manifested a remarkable disposition to adhere to the doctrine of Bay v. Coddington, even since the adoption in that State of the N. I. L. and to pay no attention to the decisions to the contrary under this law in the courts of the States that have also adopted this same law. An examination of these decisions may be found in the annual address of the President of the Nineteenth Annual Conference of the Commissioners on Uniform State Laws for 1909, published in the

[5] Swift v. Tyson, 16 Peters 1, 1842; Poirier v. Morris, 1 W. R. 349, 1853; Currie v. Misa, L. R., 10 Ex. 153, 1875.

Proceedings for that year of the American Bar Association and also published in the Proceedings of that Conference for 1909 to which the student is referred. It is submitted that the real meaning of N. I. L. § 51 is as if written thus:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed such, whether the instrument is payable on demand or at a future time, and without regard to whether the antecedent or pre-existing debt is canceled, in whole or in part, or is extended or continued, in whole or in part, whether for a definite or an indefinite period of time, either explicitly or implicitly".

Two of the latest cases under this section are Campbell v. Fourth Nat. Bk. of Cin. 126 S. W. 114 (Ohio), 1910; and Lovelace v. Lovelace, 124 S. W. 400 (Ky.), 1910; and in both of these cases the plainly expressed purpose of the section was followed.

CHAPTER VII

OVERDUE AND DISHONORED INSTRUMENTS, ETC.

§ 51. Rights of Taker of Overdue Instrument. The correct rule is laid down in the leading case of Brown v. Davies, 3 T. R. 80, 1789, that is, that where a note is overdue, that alone is such a suspicious circumstance as to make it incumbent on the party receiving it to satisfy himself that it is valid.

§ 52. Overdue or Dishonored Instruments. Properly speaking, the career of every negotiable instrument ends, either by its payment, or by its dishonor at maturity. When paid, it is dead; if dishonored, it can no longer be used as representative of money, and becomes only an ordinary *chose in action* and subject to the usual law on that subject. But by an anomaly, negotiable instruments may still be transferred, even though overdue and action has been brought, but a transfer after suit is brought, ends the suit. In the case of Hall v. Gentry, 12 Ky. 555, 1918, occurs the extraordinary sentence:

"By the institution of the suit thereon, the paper is withdrawn from the theater of commerce to the temple of justice, which can no more than that of our Holy Religion be occupied or polluted by money-changers".[1]

§ 53. Transfer of Overdue Instruments. Overdue instruments are transferred in the same way that instruments not yet due are transferred; that is, by indorsement and delivery, the indorsement being treated as an order to pay on demand.[2] The negotiability of the instrument con-

[1] Lee v. Jilson, 9 Conn. 94, 1831; Curtis v. Bemis, 26 Conn. 1, 1857; Denters v. Townsend, 5 Best and Smith 613, 1864; Vila v. Westin, 3 Conn. 42, 1865.

[2] Colt v. Barnard, 18 Pick. (Mass.), 260, 1836.

tinues, even after dishonor.[3] In conformity with the well-established law on this subject, § 26 of the N. I. L. provides that where an instrument is issued, accepted or indorsed when overdue, it is payable on demand. As regards the person so issuing, accepting or indorsing it, no case has yet arisen under this clause, so far as is known by the writer. Upon principle, however, bills and notes should lose their negotiability at maturity.

Although the legal title to an instrument continues to be transferable after dishonor, nevertheless the transferor in such a case can give no greater interest to his transferee than he himself had in the instrument.[4] Therefore, any defense that would have been valid in an action on the instrument by the transferor, is equally valid in an action against the transferee, whether the defense be payment, fraud, illegality, or failure of consideration.[5]

No unauthorized transfer of a dishonored instrument will deprive the true owner of his title. In this respect a dishonored instrument resembles an ordinary chattel. To this extent a dishonored instrument is not negotiable, like money. The reason for this is obvious—the instrument bearing upon its face evidence of dishonor, gives notice to any taker that he must inquire into the title of the one passing it to him.[6]

The question sometimes arises whether a person who is an accommodation party to an instrument, is liable, when the instrument was not negotiated until after its maturity. That depends upon the understanding of the parties to the accommodation transaction. The natural presumption would be that the accommodating party intended to lend his credit only until the maturity of the paper. This has been so held in this country, Barret v. Offerman, 7 Watts. (Pa.), 130, 1838; Glasscock v. Smith, 25 Ala. 474, 1854; Hoff-

[3] Leavitt v. Putnam, 3 Comstock (N. Y.), 494, 1850.

[4] Ashurst v. Royal Bk. of Australia, 27 L. T. 168, 1856.

[5] Many decisions on the subject may be found in note 1 of 1 Ames, Cases on Bills and Notes, 747.

[6] Texas v. Hardenberg, 10 Wall 68, 1869.

man v. Foster, 43 Pa. 137, 1862; Chester v. Dorr, 41 N. Y. 279, 1869, although it was held to the contrary in First Nat. Bk. of Salem v. Grant, 71 Me. 374, 1880; but in England the presumption is probably the other way.

It is further illustrative of the possible danger of dealing with overdue instruments, that the transferor thereof, having taken them subject to a trust or equity in favor of third persons, can only transfer them subject thereto.[7]

§ 54. **Lost or Stolen.** When an instrument payable to bearer has been lost or stolen without the fault or neglect of the owner and is presented for payment when long overdue, the party liable to pay it having received notice of the loss, is bound to inquire into the title of the holder, before paying it, and this even though the defendant is a corporation with a great number of such instruments (coupons) outstanding, and has been in the habit of paying long outstanding overdue coupons as still current, and although it gave notice to the true owner of the name of the person to whom it made payment, and although the treasury department of the United States pays coupons on bonds issued by the government payable to bearer, to the person presenting them, without regard to notice that such coupons had been stolen.[8] Subject to the exception that bank bills and certificates of deposit are overdue only after demand for their payment, the general rule in the United States is that negotiable instruments payable on demand are overdue after a reasonable time, although no demand is made. This includes checks. In Ames v. Merriam, 98 Mass. 294, 1867, Bigelow, C. J. said:

"The rule that a bill of exchange or a promissory note, taken when it is overdue, is subject in the hands of the holder to all the equities attaching to it as between the original parties, or as against the person from whom the holder receives it, does not apply to checks on banks when they are taken within a brief period of time after their date. These, although payable on demand, are not treated as

[7] *In re* European Bank, L. R. 5 ch. App. 358, 1870.

[8] Hinckley v. Union Pac. R. Co., 129 Mass. 52, 1880.

being dishonored or overdue on the day, or immediately after the day, of their date. A holder who takes a check in good faith and for value several days after it is drawn, receives it without being subject to defenses of which he has no notice before or at the time his title accrues."

This is the rule of law as settled by uniform practice and the current of decisions in the courts of the United States.[9]

Statute of Limitations. A note payable on demand is barred, under the statute of limitations, six years from its date. Upon principle, it should not be barred until six years after demand is made for payment.[10]

" . . . the question as to when the statute of limitations begins to run is not debatable. It has been held invariably that the statute commences to run against a promissory note payable on demand from the date of the note, and that no special demand is necessary to put it in motion; which follows from the rule that no demand before suit is required in order to give a right of action upon a demand note".[11]

This latter rule is illogical and undoubtedly obnoxious to the criticisms of Mr. Chief Justice Bronson, as expressed in Downes v. The Phoenix Bank of Charleston, 6 Hill 299, where he said:

"We are reminded that when the promise is to pay on demand, the bringing of the action is a sufficient demand. If that were a new question, I think the courts would not again fall into the absurdity of admitting that there must be a demand, and still holding that a suit may be commenced without any prior request. They would either say that no demand was necessary or else that it was a condition precedent to the right of action. It is an anomaly in the law that the breach of the defendant's contract should be made out by the very fact of suing him upon it. But such is the rule, and the power to change it has long since

[9] *In re* Brown v. Story, 502 Chit. Bills (12 Am. ed.), 222 and note; Byles on Bills (5th Am. ed.), 130 and note.

[10] See the trenchant remarks by the Court in Brown-Magim v. Gallant, 29 Cal. 503, 1866, at 506.

[11] Angell on Limitations, ch. 11.

passed from the courts. If a change is demanded it must be sought elsewhere". (Meaning in the legislature.)

§ 55. Reasonable Time. The question, what is a reasonable time within which an instrument overdue, payable on demand, must be presented, is to be determined by the particular facts and the special circumstances of each case.[12] N. I. L. § 4 provides:

"In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case".[13]

There is so much room for difference of opinion as to what constitutes "reasonable time" and the decisions on the subject are so discordant that they well illustrate the difficulties that arise when we depart from principle in the law of Bills and Notes. It would have been much better, when the question first arose, if the principle had been established and followed, that upon the dishonor of an instrument, it ceases to be negotiable, becoming merely a chose in action, and no longer transferable by indorsement and delivery. It is too late now to inquire as to the custom of merchants in such cases for the custom has been lost by establishing wrong principle of law evolved from the inner consciousness of judges, too often ignorant of the law merchant and indifferent to it.

§ 56. Status of Dishonored Bill. Such a bill is upon the same footing as a bill dishonored for non-payment at maturity; whoever takes a bill after it is dishonored for non-acceptance, takes it subject to all preceding equities. He takes it with notice (furnished by the notarial protest of non-acceptance.)[14]

[12] Losee v. Dunkin, 7 Johns (N. Y.) 70, 1810.

[13] McClean v. Bryer, 24 R. I. 599, 1903; Mfg. Co. v. Summers, 143 N. C. 102, 1906; Gordon v. Levine, 194 Mass. 418, 1907; Citizens Bk. v. First Nat. Bk. 113 N. W. 481, 1907; Anderson v. First Nat. Bk., 122 N. W. 918 (Iowa), 1909.

[14] Crosby v. Ham, 13 East 498, 1810; and see also the leading case of Goodman v. Harvey, 4 Al. & El. 870, 1836.

§ 57. Protest for Non-Acceptance or Non-Payment. There is a difference under the N. I. L. as to the necessity of protest between a foreign and an inland bill. § 260 provides for protest for non-acceptance and for protest for non-payment in the case of foreign bills only. Mr. Crawford, the draftsman of the law, in a foot note to this section, gives several reasons why protest is required in such cases: (1) For the sake of uniformity in international transactions. (2) Because it affords satisfactory evidence of dishonor to the drawer, who, from his residence abroad, might experience a difficulty in making inquiries on the subject and be compelled to rely on the representations of the holder. (3) Because, as foreign courts give credit to the acts of a public functionary, the protest affords the most satisfactory evidence to charge an antecedent party.

It must be remembered that for the purpose of such protests, the different States of the Union are foreign to each other, and that "residence abroad" in such cases, means residence out of the State only. But one case has yet arisen under this section, that of Amsinck v. Rogers, 93 N. Y. Supp. 87, 1905, a case deserving study. The bill called for payment on demand and this gave rise to the question whether it was a bill of exchange or a check, for although protest is requisite in the case of a foreign bill of exchange, it is not requisite upon dishonor of any other negotiable instrument under N. I. L. § 189. While protest is, therefore, not requisite in cases of foreign bills, it is very convenient in other cases, because it provides an easy and certain method of proving dishonor and that notice thereof was duly given. In the case of Amsinck v. Rogers, the instrument was found by the court to have been a foreign bill of exchange and not a check. The bill was presented for payment, and payment was formally demanded and refused, but the bill was not duly protested for non-payment, and under N. I. L. § 260 the drawer was, therefore, discharged from liability to the indorsee.

§ 58. Installment Note When Overdue. A promissory note payable by installments is overdue when the first in-

stallment is overdue and unpaid, and one who takes it afterwards takes it subject to all equities between the original parties.[15] In Thorp v. Mindeman, 123 Wis. 149, 1904, it was held, overruling previous decisions in Wisconsin, that an ordinary promissory note secured by a mortgage of real estate, is negotiable, although it provided that on default in interest or failure to comply with any of the conditions of the mortgage the whole principal, should, at the option of the mortgagee, become due and payable. While an ordinary negotiable note accompanied by the ordinary mortgage on real estate with the usual covenants to pay taxes, etc., form two separate contracts and are parts of the same transaction, each relates to its own subject matter and does not interfere with the other. Such covenants "are simple agreements for the preservation of the security; are not intended nor fitted to qualify or affect in any way the absolute promises of the note, and do not enter into or change the note in the least, nor affect its negotiability." In a later case in the same state,[16] it was held that a note providing expressly that delinquency in payment of any interest "shall cause the whole note to immediately become due and collectable" becomes due in such case absolutely, not merely at the option of the holder, and one thereafter taking the note from the payee takes it subject to the equities between the original parties. There is an interesting discussion in this opinion of the questions involved and the various decisions thereon, with mention of adjudications the other way, including Chicago R. E. Co. v. Merchants' Bk., 136 U. S. 268, 284-286, 1890; 10 Sup. Ct. 99, affirming 25 Fed. 809. The difference in the opinions of these courts illustrates the difficulty often found in construing language. The language used in N. I. L. §§ 21-23 would seem to make the subject clear now, however, for the language used is imperative, " . . . upon default in payment of any instalment or of interest, the whole shall then become due".

[15] Vinton v. King, 4 Allen (Mass.), 562, 1862. N. I. L. § 21 (3) follows the same rule.

[16] Hodge v. Wallace, 129 Wis. 84, 1906.

It is not stated that the whole shall then become due at the option of the holder, but that it shall then become due and, therefore, thereafter it is overdue, with all the consequences that follow being overdue.

Extinguishment. If the title to an instrument has become vested in the payee, nothing short of a physical destruction, cancellation, or alteration thereof, or its retransfer to the acceptor or maker, or to the drawer or drawee if the bills were not accepted, can afterwards extinguish it.

§ 59. Physical Destruction of an Instrument. The voluntary destruction of an instrument by the legal holder precludes him from all right to recover thereon, either at law or in equity. In Fisher v. Mershon, 3 Bibb. (Ky.), 527, 1814, equity gave relief through a decree, the instrument having been destroyed by a neighbor's child, who, by some means, got possession of it.[17]

In the United States the courts have generally allowed a plaintiff to recover at law upon instruments that have been destroyed, but not by the act or with the consent of the legal holder.[18]

In England, the holder of destroyed negotiable instruments cannot recover upon them at law, but is relegated to his remedy in equity. The difference may be due to the fact that equity was of slow growth in the United States and, therefore, unless the law courts would enforce the plaintiff's claim, he has no remedy. Upon principle the English doctrine is right, for there is no difference in principle between a lost instrument and an involuntarily destroyed instrument. Thus, in Hansard v. Robinson, 7 B. & C. 90, 1827, it was decided that no recovery can be had in a suit against the acceptor of a bill that had been lost. The bill itself must be produced or the plaintiff must proceed in equity. The reasoning in this case by Lord Tenterden, C. J. is convincing and shows also the right attitude

[17] See also Blade v. Noland, 12 Wend. (N. Y.), 173, 1834.

[18] Renner v. Bk. of Columbia, 9 Wheat 581, 1824; Palmer v. Logan, 4 Ill. 56, 1841; Moore v. Fall, 42 Me. 450, 1856.

with respect to following the customs of merchants. He says:

"Upon this question, the opinions of judges as they are to be found in the case quoted at the bar, have not been uniform, and cannot be reconciled to each other. It is not necessary to advert again to the cases. Amid conflicting opinions, the proper course is to revert to the principles of the actions on bills of exchange, and to pronounce such a decision as may best conform thereto. Now, the principle upon which all such actions are founded is the custom of merchants. The general rule of the English law does not allow a suit by the assignee of a *chose in action.* The custom of merchants, considered as part of the law, furnished in this case, an exception to the general rule. What, then, is the custom in this respect? It is that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money, deliver up the bill. The acceptor paying the bill, has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* (to that extent) in his account with the drawer. . . . As far as his voucher and discharge towards the drawer, it will be the same thing whether the instrument has been destroyed or mislaid."

Another leading case on this subject is Ramuz v. Crowe, 11 Jurist 715, 1875, in which, after citing many discordant opinions, the court decided:

"The bill accepted by the defendant was negotiable; and the plaintiff by reason of his loss of it, being unable to produce it to the defendant, cannot, by the law merchant, compel him to pay the amount".

The difficulty in suing upon a lost instrument has been met in many courts by requiring the plaintiff to furnish a bond or other indemnity, to protect the defendant, should the lost instrument turn up later in the hands of an innocent purchaser for value without notice of the payment. Thus, in Welton v. Adams, 4 Cal. 37, 1854, where a certificate of deposit was held to be negotiable and to be placed on the same footing as promissory notes, upon suit on a

certificate of deposit that had been lost, its maker was found to have a right to require indemnity against all future claims under it, before its payment can be enforced by law.

Cancellation. A cancellation by the legal holder of an instrument, made with the intention to cancel the instrument, is equivalent to its physical destruction. It is difficult to state what will constitute a sufficient cancellation so that a purchaser will be deemed to have had notice. See Yglesias v. River Bank, 3 C. P. D. 60, 1877, and Baxendale v. Bennett, 3 Q. B. D. 525, 1878, (overruled Ingham v. Primrose, 7 C. B. N. S. 82, 1859), in which the acceptor of a bill, with the intention of cancelling it, tore it into two pieces and threw them into the street. They were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because, said the court, although he intended to cancel it, yet he did not cancel it.

§ 60. Alteration. The transfer of a negotiable instrument that has been materially altered after its issue in a completed state, passes no title, even to an innocent purchaser for value, as against those persons who put their names to the instrument in its original state. Those persons are not parties to the altered instrument which the holder received and the holder is not a party to the instrument that the original parties put their names to. Thus, the alteration of the date of a bill of exchange, made after acceptance, for the purpose of accelerating the date of payment, avoids the instrument. No action can be brought upon it, even by an innocent holder who had paid value.[19]

Is the Alteration Material? The main question in this class of cases is whether the alteration is material or immaterial.[20] N. I. L. § 205 provides that where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the

[19] Master v. Miller, 4 T. R. 320, 1791.

[20] See the full note on this subject, with citation of numerous decisions, 1 Ames, Cases on Bills and Notes, 447.

alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. It will be noticed that the latter clause makes a change in the law. Twenty-seven cases have already been decided under this section, and there are other cases decided where this law is in force, but without referring to it. In N. Y. Life Ins. Co. v. Martindale, 88 Pac. 559 (Kans.), 1907, it was held that a promissory note is vitiated, that is, materially altered, by an unauthorized alteration making it carry a lower rate of interest than that mentioned in the original note. In Mitchell v. Reed's Excr. 106 S. W. 833 (Ky.), 1908, an alteration making the instrument payable in another State, was held to be a material alteration. In Stanley v. Davis, 107 S. W. 773 (Ky.), 1908, the change of "I" to "We" was deemed immaterial, under the circumstances. In the last reported case on this subject,[21] the alleged alterations were found to be immaterial memoranda or notations, as they made no change in the date, the sum payable, either principal or interest, the time of payment, the number or relation of the parties, or the medium or currency in which payment was to be made. The inquiring student will find an illuminating note on this section of the N. I. L., the case decided under it, as well as those that should have been decided under it, but were not, in "The Negotiable Instruments' Law" by Prof. Brannan of the Harvard Law School. See also comments on this section and the change it has made in the law in some states, in Crawford's edition of the N. I. L. The ingenuity of rascality in making alterations in negotiable instruments and later, upon suit brought, the ingenuity of their counsel in claiming that the alterations made are immaterial, have led to many cases, both before and since the adoption of the N. I. L. What constitutes a material alteration is defined in N. I. L. § 206. In Lawless v. State, 114 Wis. 189, 1903, the insertion of the figure 5 before the figure 9, the instrument being other-

[21] Pitt v. Little, 108 Pac. 941 (Wash.), 1910.

wise unchanged, was held to be a material alteration, constituting forgery, but this section was not cited as it should have been.

§ 61. Retransfer of an Instrument. The retransfer of an instrument to the maker or acceptor is an extinguishment thereof at maturity or after. The right to demand payment and the duty to pay concur in the same individual and the obligation is at an end. The leading case on this subject,[22] is Harmer v. Steele, 4 Ex. R. 1, 1849.

So far is this doctrine carried that where the payee who is the holder of a promissory note, appoints the maker of the note as his executor and dies, the debt is discharged and no action can be maintained on the note, even by a person to whom the executor has indorsed it.[23] In such a case the executor is liable in equity to the estate he represents, for the amount of the note as assets in his hands. It should be said that this result does not follow the application of any rule according to the customs of merchants, but rather from carrying out the principle of the common law that an executor cannot sue himself, and cannot, as executor, indorse his individual note.

If retransferred to the maker or acceptor before maturity and such maker or acceptor takes it as an ordinary purchaser, he may again transfer it to a purchaser, it not having been his purpose to extinguish it.[24]

§ 62. Acceptor's Liability. Under the custom of merchants, an acceptor of a bill or a maker of a promissory note is bound to honor his bill or note, that is, to pay it at maturity, at the place designated in the instrument, or if none is designated, then at the residence or place of business of the acceptor or maker, at a reasonable hour of the

[22] Savage v. Merle, 5 Pick. 83, 1827; Cox v. Hodge, 7 Blackf. (Ind.), 1844; Edwards v. Campbell, 23 Barb. 423 (N. Y.), 1856; Gordon v. Wansey, 21 Cal. 77, 1862; Walton v. Young, 26 La. Am. 164, 1874.

[23] Freakley v. Fox, 9 B. & C. 130, 1829.

[24] Attenborough v. Mackenzie, 25 L. J. R. Ex. 244, 1856; Conwell v. Finnell, 11 Ind. 577, 1859; Swope v. Ross, 110 Pa. 186, 1861; Rockingham Bk. v. Clugett, 29 N. H. 292, 1854; Rogers v. Gallagher, 49 Ill. 162, 1862; Kipp v. McChesney, 66 Ill. 460, 1872.

day of maturity or of any subsequent day, if not presented when due, now generally considered to be before three P. M. at which hour banks are closed. The holder must, therefore, present the instrument for payment and must surrender it upon payment. Unless the instrument is made payable at a particular place, the creditor must seek the debtor at his residence or place of business, whereas in the case of an ordinary debt, the debtor must seek the creditor. The holder can also determine at what time of the day of maturity an acceptance shall become payable (within reasonable limits) whereas an ordinary debtor has until midnight to pay his debt unless otherwise fixed. It is unfortunate that in the course of the development of the law of bills and notes in England (and later in the United States) the courts in some cases adopted the principle of the law merchant in this matter, while in others they have persisted in not recognizing the proper distinction between the obligations of payers of negotiable instruments and those of ordinary debtors. This has led to inconsistencies in their decisions that have been avoided upon the continent of Europe by following the custom of merchants.

CHAPTER VIII

PRESENTMENT AND PROTEST

§ 63. Presentment Necessary. In conformity with the custom of merchants, the courts have held that the holder is not entitled to payment unless he makes a tender of the instrument to the acceptor or maker.[1] If the holder refuses to surrender the instrument upon payment at maturity, the acceptor or maker may recover the money paid or he may maintain trover for the instrument.[2]

Unless there is some statute providing for giving a bond of indemnity, when suit is brought upon a lost note, it is also in accordance with the custom of merchants that no action will lie, in such a case against the acceptor or maker; that is to say, the instrument must be produced.[3] We need not do more here than to point out the well recognized power of courts of equity to grant relief in such cases,[4] for we must confine ourselves to our subject, Bills and Notes, leaving Equity to another course. Presentment to the drawee or maker, either for acceptance or payment, is necessary to establish the dishonor of an instrument, and is, therefore, a condition precedent to any liability by the drawer or indorser.[5]

Where Made. If an instrument is made payable at a particular place, presentment for payment at that place must be made.[6] The American cases are uncertain.[7] Upon

[1] Hansard v. Robinson, 7 B. & C. 90, 1827; Ramuz v. Crowe, 11 Jurist 715 or 1 Ex. 167, 1847, § — *ante.*

[2] Alexander v. Strong, 9 M. & W. 733, 1842; Stone v. Clough, 41 N. H. 260, 1860; Spencer v. Dearth, 43 Vt. 98, 1870; Otisfield v. Mayberg, 63 Me. 197, 1874.

[3] Pierson v. Hutchinson, 2 Camp. 211, 1809.

[4] See Savannah Nat. Bk. v. Haskins, 101 Mass. 370, 1869.

[5] Blesard v. Hirst, 5 Burr. 2670, 1770; Stanton v. Blossom, 14 Mass. 116, 1817.

[6] Sanderson v. Bowes, 14 East 500, 1811; Rowe v. Young, 2 Br.-Bing. 165, 1820, a famous case.

[7] See Wallace v. Vance, 17 Mass. 339, 1821.

suit on a note the defendant pleaded that he was ready at the day and place appointed in the note, with his money, to discharge his promise, but the holder of the note, the promisee, was not there to receive it. Influenced by their knowledge of the rule of the common law, and disregarding the custom of merchants, the court decided that this was not enough, and that the defendant must further make a *profert in curia,* that is, offer to pay it in court, as if it were an ordinary action in debt. The learned court did not know, when they rendered this decision, the case of Rowe v. Young, decided in England the preceding year, or they might have taken a different view of the case. In Carley v. Vance, 17 Mass. at p. 393 is a note upon Rowe v. Young, in vain attacking the correctness of that case. Even so great and learned a man as Shaw, the Chief Justice of Massachusetts, was led into error in this particular, in Carter v. Smith, 9 Cush. 321, 1852. His statement of the English law as to the necessity for demand in cases of suits upon promissory notes payable at a particular place is pronounced by Dean Ames, to be entirely erroneous.[8] The note in suit was made payable "at either of the banks in Portland" (Maine). The action was brought in Massachusetts and as the court held that *profert in curia* must be made there, his decision was, in effect, that the maker of a negotiable instrument agreeing thereunder to pay a stated sum of money in Maine, can be made to pay it in Massachusetts. The learned judge . . . applied the rule of the common law—unknown in the law merchant—that a debtor must seek his creditor and neglected the custom of merchants, in this case. A similar want of knowledge and understanding of the custom of merchants in Dougherty v. The Western Bk. of Ga, 287, 1853, has been generally followed in the United States, so that in actions upon instruments payable on demand, it is held not to be necessary to aver and prove a demand, the suit itself being a sufficient demand. But it has also been decided in this

[8] 2 Ames, Cases on Bills and Notes, 93 n. 1.

country,[9] that the maker of a promissory note made payable on demand at a particular place cannot be held on it unless it is presented for payment at the place where it is expressed to be payable. Such is the law merchant and such is the intention of the parties to the note, and courts should give effect to it.

§ 64. Presentment for Acceptance Under the N. I. L. This subject is provided for in §§ 240-249 of the statute. Only one case has so far arisen under this section, that of Van Buskirk v. State Bk. of Rocky Ford, 83 Pac. 778 (Col.), 1905, in which it was held that as a check is a bill of exchange drawn on a bank and is subject to the sections of the statute relating to bills of exchange, a drawee of a check is not liable to the holder until it accepts or promises to pay it in writing. It will be seen that some of the questions we have above discussed are set at rest by these sections of the N. I. L. But the courts have not yet acquired the habit as generally as they should, of taking into consideration decisions, in other States in cases arising under the same section of the same statute with a view towards uniformity in decisions as well as uniformity in statute law.

§ 65. Presentment for Payment Under the N. I. L. This subject is provided for in §§ 130-160 of the statute, to which the student is referred. In Florence Oil Co. v. First Nat. Bk. of Cañon City, 88 Pac. 182 (Col.), 1906, it was held under § 130, in an action on a note payable at a specified place, that the burden is not on the plaintiff to prove that before bringing the action, the note was presented for payment at that place, but is a matter of defense, that is, the defendant must prove a negative. The court imposed a penalty of ten per cent of the amount of the judgment because it found the luckless defendant guilty of frivolous delay in taking an appeal, while the court also quoted with approval the erroneous doctrine, erroneous in principle, although unfortunately sanctioned by decisions, that in an action against the maker of a note payable at a particular time and place, a demand need not be averred or proved,

[9] Bk. of N. C. v. Bk. of Cape Fear, 13 N. C. 75, 1851.

In Hyman v. Doyle, 103 N. Y. Supp. 778, the court held that in an action on a note payable on demand at a specified place, the complaint will not be dismissed because the plaintiff failed to prove demand. Many old cases are cited in this opinion but no mention is made of the law of the State, the Negotiable Instrument Law, an omission too common in the New York decisions.

§ 66. Obligation of the Drawer and Indorser. Every drawer or maker promises the payee and all subsequent holders, and every indorser promises his indorsee and all subsequent holders, that if the drawee or maker fails to honor the instrument, he will indemnify the holder from all loss incurred by reason of the dishonor of the instrument, provided certain conditions imposed by the custom of merchants are complied with. This contract of indemnity applies to the instrument according to its tenor at the time when the drawer or indorser signed it. Accordingly, the liability of a drawer or indorser is not affected by a prior forgery or alteration, nor by the existence of any other defense in favor of prior parties.[10] One *P* drew a bill payable to his own order and indorsed it to the defendants, who indorsed it to the plaintiff, who brought suit after presentment and dishonor. The defendant's plea denied the indorsement by *P* to the defendants. "Are the defendants who admit that they indorsed to the plaintiff, at liberty to deny that Pinckney indorsed to them? The issue would be idle," said Lord Campbell, C. J.[11] In § 116 of the N. I. L. it is specifically stated that if the instrument be dishonored and the necessary proceedings on dishonor be duly taken (presentment and notice of non-payment, if a promissory note, protest if a foreign bill of exchange) the indorser will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay

[10] MacGregor v. Rhodes, 6 E. & B. 266, 1856.

[11] See also, Codwise v. Gleason, 3 Day (Conn.), 12, 1808; Bank v. Fearing, 16 Pick. (Mass.), 533, 1835; Bestor v. Walker, 9 Ill. 3, 1847; Mills v. Barney, 22 Cal. 248, 1863; Condon v. Pearce, 43 Md. 83, 1875.

it. This section was held not to apply to an indorser of a note made payable to several persons when the maker, without the authority or knowledge of the indorser, altered the note before negotiation, by striking out the name of one of the payees and substituting his own name as payee thereon.[12] In Horowitz v. Wollowitz, 110 N. Y. Supp. 972, 1908, it was held that under this section an indorser of a note cannot defend on the ground that the note was void because of usury in its inception.[13] The obligation of each indorser is a new and independent contract. But if the holder is an accommodation maker of the note for the benefit of an indorser in blank whose proper debt it is to pay, the holder's remedy is an action for money paid, wherein he may show he made the note for the indorser's accommodation. The action should not be on the indorsement.

§ 67. Protest.[14] The obligation of a drawer or indorser is conditional upon a protest in the case of foreign bills only, upon dishonor.[15] A protest is never necessary upon an inland bill, see N. I. L. § 189. It must not be forgotten, however, as previously stated, that a bill drawn in one State of the Union, payable in another state, is a foreign bill and must, therefore, be protested for non-payment.[16] In many cases though a protest is not indispensable, it furnishes ready and sufficient evidence of presentment, either for acceptance or for payment, and of dishonor.

§ 68. Notice of Dishonor. By the custom of merchants a drawer, maker, or indorser of an instrument is entitled to due notice of dishonor before he can be called upon to take up the dishonored instrument.[17]

[12] First Nat. Bk. of Brooklyn v. Gridley, 112 A. D. (N. Y.), 398, 1906.

[13] See Klav. v. Kostiuk, 119 N. Y. Supp. 683, 1909.

[14] On the subject of Notice and Protest see N. I. L. Art. VII., §§ 160-200.

[15] Gale v. Welsh, 5 T. R. 239, 1793; Dennistown v. Stewart, 17 Howard (U. S. Sup. Ct.) 606, 1854.

[16] Buckner v. Finley, 2 Peters (U. S. Sup. Ct.) 586, 1829.

[17] Dagglish v. Weatherby, 2 W. Bl. 747, 1771; Dwight v. Scovil, 2 Conn. 654, 1818; Anderson v. Yells, 15 Ark. 9, 1854; Beckwith v. Carleton, 15 Ga. 691, 1854; Webber v. Mathew, 101 Mass. 481, 1869; Red Oak Bk. v. Orvis, 40 Iowa 332, 1875; Ford v. Booker, 53 Ind. 395, 1876.

This is equally true upon dishonor for non-acceptance.[18]

§ 69. Surrender of the Instrument to Drawer or Indorser. We have already seen that an acceptor or maker cannot be charged at law if the bill or note is lost or destroyed, in the absence of legislation providing for a bond of indemnity (except in equity). It is equally true that under the custom of merchants, a drawer or indorser cannot be charged at law if the instrument is lost or destroyed.[19] In accordance with this principle, a tender of payment upon condition that the instrument be surrendered has been held to be a good tender. Walker v. Barnes, 5 Taunt 240, 1813, correct as to the *time* of payment, but not as to the *amount,* for interest should have been added for the delay of one day. This omission was corrected in Siggers v. Lewis, 3 L. J. R. N. S. Ex. 312, 1834, where the true statement is made by Burney B. "After notice of dishonor to the drawer, he is bound to pay on demand".[20] But the precedents for declarations upon bills contain no averment of presentment to the drawer or indorser.[21] This but illustrates the want of wisdom in framing the pleadings in bills and notes in accordance with the principles of the common law instead of framing them in accordance with the custom of merchants. The difficulties arising from these inconsistencies have been met by decision of the courts and now by the provisions of the N. I. L. §§ 160-189.

§ 70. Presentment for Acceptance. Only bills payable after sight need be presented for acceptance.[22] See N. I. L. § 240, for certain modifications of this principle. Under this section and other sections it was held in Van Buskirk v. State Bk. of Rocky Ford, 83 Pac. 778 (Col.), 1905, that

[18] Blesard v. Hirst, 5 Bur. 2670, 1770; Stanton v. Blossom, 14 Mass. 116, 1817; Austin v. Rodman, 1 Hawks (N. C.), 144, 1820; Thompson v. Cumming, 2 Leigh (Va.), 321, 1830.

[19] Tuttle v. Standish, 4 Allen (Mass.), 481, 1862, an important decision.

[20] Wilder v. Seelye, 8 Burb. (N. Y.), 408, 1850.

[21] Chitty, Pleading, 31 *et seq.*

[22] Philpott v. Bryant, 2 C. & P. 244, 1827; Bk. of Washington v. Tripplett, 2 Peters (Sup. Ct. of U. S.) 25, 1828; Bk. of Bennington v. Raymond, 12 Vt. 401, 1839.

the drawer of a check is not liable to the holder until it accepts or promises to pay it in writing. This is usually done by certifying the check, that is, by writing "certified" across the face of the check, followed by the name of the certifying officer of the bank.

As Crawford says, in his note to this section:

"Although when a bill is made payable at a day certain, as at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorser, yet where a bank receives such a bill for collection its duty is to present the bill for acceptance without delay. For it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawer become bound to pay it, and, until such acceptance, the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests would take for his protection".[23]

Time of Presentment. Bills payable after sight must be presented for acceptance within a reasonable time.[24] In a note, 2 Ames, Cases on Bills and Notes, 277, may be found a list of cases, English and American, in which the presentment was held to be within a reasonable time, and another list in which the presentment was held to be too late. The question is one for the jury to determine, and as Buller J. said, in Muilman v. D'Equino, 2 H. Bl. 565, 1795:

"The only rule that I know of, which can be applied to all cases of bills of exchange is that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner".

This is the principle adopted in § 241.

Bills payable at a fixed day may be presented for acceptance at any time during business hours on the day of maturity.[25] N. I. L. § 242, providing that such presentment

[23] Allen v. Suydam, 17 Wend. 368; Crawford, Ann. N. I. L. note to § 240.
[24] Muilman v. D'Equino, 2 H. Bl. 565, 1795.
[25] Plato v. Reynolds, 27 N. Y. 586, 1863.

must be made "before the bill is overdue", is to the same effect.

Place of Presentment. A bill addressed to a drawee at a particular place, should be presented for acceptance at that place. If addressed to him at a particular house or office in a town or city, it should be presented at that house or office. If addressed to him only at a particular town or city, it should be presented at the drawee's residence or at his place of business in that town or city. If the bill contain no address, it should be presented at the drawee's residence or place of business at the town of presentment.

If the drawee is not to be found at the appropriate place for presentment, the bill may be treated as dishonored.[26]

Presentment for Acceptance—By Whom Made. Inland bills may be presented by the holder or by any one authorized by him to make presentment. Foreign bills must be presented for acceptance by a notary. (Because a notarial certificate is admissible as evidence in the foreign jurisdiction. This is discussed further under presentment for payment.)[27]

Presentment for Acceptance — To Whom Made. Presentment should be made to the drawer or to some person authorized by him to return an answer.[28] In Bk. of Washington v. Treplett, 1 Pet. 25, 1828, Marshall, C. J., said, (p. 25):

"Absence from home" (of the drawer) "with a failure to make provision for payment when a bill becomes due, is a failure to pay; but absence from home when the holder of a bill or his agent offers it for acceptance, is in no respect culpable. . . . Had the bill, under such circumstance, been protested for non-acceptance the drawer might not have been liable for it".

In Wiseman v. Chiapella, 23 How. (U. S. Sup. Ct.) 368, 1859, the court said, by Wayne J.:

[26] Wolfe v. Jewett, 10 La. (o. s.), 614, 1835; N. I. L. § 133.
[27] See N. I. L. § 242.
[28] Cheek v. Roper, 5 Esp. 175, 1804.

"In making a demand for an *acceptance,* the party ought, if possible, to see the drawee personally, or some agent appointed by him to accept; and diligent inquiry must be made for him if he shall not be found at his home or place of business".[29]

§ 71. Joint Drawees. N. I. L. § 212 provides that a bill may be addressed to two or more drawees jointly, whether they are parties or not; but not to two or more drawees in the alternative or in succession. This is in accordance with the custom of merchants. Such a bill should be presented for acceptance to all the drawees, § 242, except in the case of a partnership, in which case any partner may accept for the partnership.

§ 72. Presentment for Payment. Presentment to the drawee or maker is a condition precedent to the liability of a drawer or indorser or acceptor for honor.

The cases that have arisen under § 130 of the N. I. L. in the States that have adopted it are given below.[30]

Time of Presentment for Payment of Bills. To charge a drawer or indorser, presentment for payment must be made upon the day the instrument is due. Presentment either before or after maturity is a nullity.[31]

"But no protest for non-payment can be before the day that it is payable. Proved by merchants at Guildhall, Trin. 6 W. & M. before Treby, chief justice. And the plaintiff was nonsuited, because he had declared upon a custom, to protest for non-payment before the day of payment".

Presentment after the day of maturity is too late.[32]

[29] See N. I. L. § 242, 245-248.

[30] The German American Bk. v. Millman, 31 Misc. (N. Y.), 87, 1900; *In re* Swift, 106 Fed. 65, 1901; Nelson v. Grandhal, 13 N. Dak. 363, 100 N. W. 1093, 1904; Welch v. Kukuk, 107 N. W. 301 (Wis.), 1906; Galbreuth v. Shepard, 86 Pac. 1113 (Wash.), 1906; Florence Co. v. First Nat. Bk., 88 Pac. 182 (Col.), 1906; Rouse v. Wouten, 140 N. C. 557, 1906; Baumeister v. Kuntz, 42 So. 886 (Fla.), 1907; Hyman v. Doyle, 103 N. Y. Supp. 778, 1907; O'Bannon Co. v. Curran, 113 N. Y. 359, 1908; Bardsley v. Washington Mill Co., 103 Pac. 822 (Wash.), 1909.

[31] Anonymous, 1 Ld. Rayd. 743, 1701.

[32] Woodbridge v. Binggam, 12 Mass. 403, 1815.

The time of maturity is defined in N. I. L. § 145 as the time fixed in the instrument, without grace. When this falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day except that instrument payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday. In Demelman v. Brazier, 193 Mass. 588, reported also in 79 N. E. 812, it was held that in the absence of evidence to the contrary, the presumption is that the old law allowing days of grace still remains the law of a sister state (unless the contrary is shown).

Other provisions for presentment for payment may be found in §§ 130-148 of the N. I. L.

Time of Presentment for Payment of Checks. The old mercantile rule was that checks must be presented or forwarded for presentment, not later than the day after they are received.[33] The plaintiff had a bill on the defendant for which the defendant gave him a bill on another banker at twelve o'clock, noon, who stopped payment before the next morning. The jury found for the defendant and the court sustained their verdict. The want of proper understanding or knowledge of the law merchant is well illustrated by the remark of Foster, J. in this case:

"Bankers have no right to establish a customary law among themselves at the expense of other men".

In other words, he declined to follow the custom of merchants. But it is the custom of merchants that determines what the law is, in Bills and Notes.

N. I. L. § 322 provides that a check must be presented within a reasonable time after its issue or the drawer will be discharged from inability thereon to the extent of the loss

[33] Rickford v. Ridge, 2 Camp. 537, 1810; Pocklington v. Silvester, Chitty Bills, 10th ed. 346, n. 1, 1817; Smith v. Janes, 20 Wend. (N. Y.), 192, 1838, all good cases; Hawkey v. Trotman, 1 Wm. Bl. 1, 1746 is not law.

caused by the delay. The cases under this section are given below.[34] There would be more uniformity as to what constitutes reasonable time if the courts in the various States of the Union that have adopted the N. I. L. were to take into consideration each other's decisions under the same section. They have not yet awakened to the conception of uniform decisions of a uniform law. Whether this is because counsel in cases arising under the law, do not always cite the decisions in other States under the same section, is not easy to determine, under the present faulty system of reporting cases without referring to the authorities in point cited, or that ought to be cited, by counsel on either side.

Place of Presentment. Following the custom of merchants as embodied in numerous cases, N. I. L. § 133 provides for presentment in the contingency therein specified. The cases that have arisen under this section are given below.[35] N. I. L. §§ 130-148 inclusive treat of this subject and the student is advised to study them carefully, also the notes to these sections in Crawfords Ann. N. I. L.

§ 73. Notice of Dishonor. By the custom of merchants, a drawer or indorser is entitled to due notice of dishonor before he can be called upon to take up the instrument, but, as we have seen, notice need not be given to the drawer in order to charge an indorser. This has been changed however, by N. I. L. § 160, under which any drawer or indorser

[34] Moskovitz v. Deutsch, 46 Misc. (N. Y.), 603, 1905, in which, by implication, ten days is held to be presentment within a reasonable time; Aebi v. Bk. of Evansville, 102 N. W. 329 (Wisc.), 1905; Symonds v. Riley, 74 N. E. 926 (Mass.), June 1905; Singer Mfg. Co. v. Simmons, 55 S. E. 522 (N. C.), 1906; Kramer v. Grant, 111 N. Y. Supp. 709, 1908, in which it was held though the giving of a check in satisfaction of a debt is no more than a provisional payment, such a payment becomes absolute where the authorized agent of the creditor indorsed the creditor's name on the check and negotiated it to a third person. See also Dehoust v. Lewis, 112 N. Y. Supp. 559, 1908, in which it was held where a check drawn October 11, was received October 12, that a reasonable time for presentation expired at the close of business on October 13.

[35] German Amer. Bk. v. Milliman, 31 Misc. (N. Y.), 87, 1900; Congress Brewing Co. v. Habeincht, 83 App. Div. (N. Y.), 141, or 82 N. Y. Supp. 481, 1903; Nelson v. Grondahl, 100 N. W. 1903 (N. Dak.), 1904; Iron Clad Mfg. Co. v. Sackin, 110 N. Y. Supp. 161, 1908, and 114 N. Y. Supp. 42, 1908.

is discharged to whom no notice has been given of dishonor by non-acceptance or non-payment.

Requisites of. Notice need not be in any set form but it must give a fair description of the dishonored instrument, with the statement that it has been dishonored and with the name of the person giving the notice or of the person authorizing it. In Mellersh v. Rippen, 7 Ex. 578, 1852, the notice ran:

"I beg to inform you that your acceptance for £64, 10s. 11d. due today, drawn by Mr. J. Hunt, is not paid. Please have the goodness to hand me a check for the same, with noting expenses, 2s. 6d. per return" was held to be a sufficient notice.

The note to this case, 2 Ames, Cases on Bills and Notes, 377, gives many cases, both of sufficient and insufficient notice.[36] The notice need not expressly state that the party to be charged is looked to for payment,[37] nor where the dishonored instrument is to be found.[38] Nor need it be accompanied by a copy of the protest.[39] It need not even be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby.[40]

The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment.[41]

[36] See also Mills v. The Bank of the U. S. 11 Wheat (U. S. Sup. Ct.) 431, 1826.

[37] Bk. of U. S. v. Carnal, 2 Peter (U. S. Sup. Ct.) 543, 1829.

[38] Mills v. The Bank of the U. S., 11 Wheat (U. S. Ct.) 431, 1826.

[39] Goodman v. Harvey, 4 Ad. & El. 870, 1836; Dennistown v. Stewart, 17 How. (U. S. Sup. Ct.) 606, 1854.

[40] See § 166 and the cases under it: Second Nat. Bk. v. Smith, 118 Wis. 18, 1903; Wilson v. Peck, 121 N. Y. Supp. 344, 1910.

[41] See § 167 and the cases under it, Second Nat. Bk. v. Smith *ut supra;* Reed v. Spear, 94 N. Y. Supp. 1007, 1905; Am. Ex. Bk. v. Am. Hotel Victoria Co., 92 N. Y. Supp. 1006, 1905; Zollner v. Moffitt, 72 at 285 (Pa.), 1909.

Time of Serving Notice. Notice of non-payment may be given on the day of presentment, immediately after a refusal to pay or to accept.[42] N. I. L. §§ 174-175 provide for notice to parties residing in the same place, and in different places, respectively. When the day, or the last day, for doing any act required or permitted to be done under the N. I. L. falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day, under § 5.[43]

§ 74. What Constitutes a Check. What constitutes a check is stated in N. I. L. § 321, as follows:

"A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check".

This definition is in accord with well-settled law, rendering examination of old cases unnecessary here. The cases under this section are given below.[44]

§ 75. When Check Must Be Presented. Under N. I. L. § 322, a check must be presented within a reasonable time after its issue or the drawer will be discharged from liability thereon, to the extent of the loss caused by the delay. The student will notice that this section applies only to the drawer. The rights and liabilities of the indorser are governed by N. I. L. § 131. As already stated, what constitutes "reasonable time" depends upon the facts in each case. The cases are given below.[45]

[42] *Ex parte* Moline, 19 Vesey 216, 1812; Bussard v. Levering, 6 Wheat 102, 1821; to the same effect, see N. I. L. § 173.

[43] See §§ 139, 140-142 for causes excusing presentment for payment.

[44] Balt. & Ohio R. Co. v. First Nat. Bk., 47 S. E. 837, 1904; St. Bk. v. Weiss, 91 N. Y. Supp. 276, 1904; Schlesinger v. Kurkrok, 94 N. Y. Supp. 442, 1905; Amsinck v. Rogers, 93 N. Y. Supp. 87, 1905; Symonds v. Riley, 74 N. E. 926 (Mass.), 1905; Van Buskirk v. St. Bk., 80 Pac. 778 (Col.), 1905; Plover Sgs. Bk. v. Moodir, 10 N. W. 29 (Iowa), 1906; Boswell v. Citizens Sgs. Bk., 96 S. W. 797, 1906 (a good case to study); Gordon v. Levin, 80 N. E. 505 (Mass.), 1907; Camas Prairie St. Bk. v. Newman, 99 Pac. 833 (Id.), 1909.

[45] Aebi v. Bk. of Evansville, 102 N. W. 329 (Wis.), 1905; Moskovitz v. Deutsch. 46 Misc. 603, or 92 N. Y. Supp. 721, 1905; Symonds v. Riley, 74

§ 76. Certified Checks. A check is certified by no particular definite form, but by any word or words expressing the fact that the bank has set aside so much of the depositor's fund with which to pay that particular check, signed with the name of the proper officer of the bank. This is generally done by writing across the check "Good" or "Accepted" with the signature. N. I. L. § 324 provides that where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.[46]

Certified Check an Assignment. The legal effect of the certification of a check is the same as would be produced if the holder were to surrender the check, receiving therefor the note or the certificate of deposit of the bank, payable on demand. N. I. L. § 325 provides "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check". The cases are given below.[47]

Certified Check Good until Demand for Payment. In Merchants Bk. v. State Bk., 10 Wall 604 at 647, the Supreme court of the United States said:

"By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawer, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking

N. E. 926 (Mass.), 1905; Singer Mfg. Co. v. Summers, 55 S. E. 522, 1906; Kramer v. Grant, 111 N. Y. Supp. 709, 1908; Dehoust v. Lewis, 112 N. Y. Supp. 559, 1908.

[46] See Cullinan v. Union Surety & Guaranty Co., 79 App. Div. 409 (N. Y.), 1903; Meuer v. Phoenix Nat. Bk., 88 N. Y. 83, 1904; St. Regis Paper Co. v. Tonawanda B. & P. Co. 94 Supp. 946, 1905.

[47] Nat. Bk. of N. J. v. Berrall, 58 At. 189, 1904; St. Bk. v. Weiss, 91 N. Y. Supp. 276, 1904; Meuer v. Phoenix Nat. Bk., 88 N. Y. Supp. 83, 1904; Balt. & O. R. Co. v. First Nat. Bk., 47 S. E. 837 (Va.), 1904; Schlesinger v. Kurzrok, 94 N. Y. Supp. 442, 1905; Pease & Dwyer Co. v. St. Nat. Bk., 88 S. W. 172 (Tenn.), 1905; Van Buskirk v. St. Bk. of Rocky Ford, 83 Pac. 778 (Colo.), 1905; Boswell v. Citizens Sgs. Bk., 96 S. W. 797 (Ky.), 1906.

that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available to him for all the purposes of money. Thus it continues to perform its important functions, until in the course of business it goes back to the bank of redemption and is extinguished by payment."

CHAPTER IX

CERTIFICATES OF DEPOSIT

§ 77. Origin Of. We have seen the important part played by the goldsmiths in London during the troubled time that ended in Civil War. Even before that time it had been the custom of the goldsmiths to give receipts to their customers for money deposited, in the form of promissory notes payable to the bearer on demand or to the depositor or order.[1] By the Statute 3 & 4 Anne, ch. IX they were placed on the same footing as bills of exchange. This was the precursor of the modern certificate of deposit, which is an acknowledgment that *A* has deposited a stated sum with a promise to pay it to the depositor or order. In pleading on them they are treated as common promissory notes.[2] We must remember that this was before checks had come into use. They were simpler in form and superseded certificates of deposit, except when the intention of the parties was that the deposit should remain in the bank where deposited and should draw interest.

"The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass book, is intended to represent moneys, actually left with the bank for safekeeping, which are to be retained until the depositor actually demands them".[3]

§ 78. Equivalent to a Promissory Note. Although containing words of negotiability and being, therefore, negotiable according to the custom of merchants, modern courts have shown the same indisposition to recognize them that characterized the attitude of the courts about 1700 con-

[1] Nicholson v. Sedgwick, 1. Ld. Raym 180, 1697.

[2] Chitty on Bills, 13th Am. Ed. (*522), 591; Byles on Bills, (*10) 81.

[3] 2 Daniel, Negotiable Instrument, § 1698a.

cerning the negotiability of bills and notes. Thus, in Bank of Orleans v. Merrill, 2 Hill 295 (N. Y.), 1842, although the certificate of deposit was made payable to order and was recognized by the court to be in effect a negotiable promissory note, yet it was refused the sanction of the court as the basis of a right of recovery, because this would "disregard the provisions of the statute against the issue of a spurious and illegal currency". It is difficult to see how a certificate showing, for instance that so many gold dollars are deposited in a bank which promises to pay them to the order of the depositor, can be looked upon as "a spurious and illegal currency" and in utter disregard of the fact that such a certificate is negotiable by the custom of merchants. A more rational view was taken in Miller v. Austen, 13 Howard 218, 1851, the Supreme Court holding, with the aid of a statute of Ohio, that such a certificate of deposit is a negotiable instrument, and that the last indorser could maintain a suit thereon against his immediate indorser. In Hunt, App. 141 Mass. 515, at 519, 1886, it was held that such a certificate of deposit is not in violation of the U. S. Rev. Stat. § 5183, forbidding national banks to issue any other notes to circulate as money than such as are authorized by the provisions of the statute. The court said:

"It cannot be considered as a note intended to circulate as money within the meaning of the statute. It requires to be indorsed. It was understood not to be payable till a certain future date. It is not in a sum adopted for general circulation as money. The form of the instrument and the incidents above mentioned show that it was not intended to circulate as money between individuals, and between government and individuals, for the ordinary purposes of society".

If the same reasoning had been followed in Bk. of Orleans v. Merrill, 2 Hill 295 (N. Y.), 1842, the same conclusion would have been reached forty-four years earlier. That is, it took forty-four years for the courts to grow up to the principles of the law merchant.

Where a bank issues a certificate of deposit "payable on

the return of this certificate properly indorsed", "it is liable thereon to a *bona fide* holder—an indorsee to whom it was transferred seven years after its issue; and the bank was still held liable for the full amount of the certificate, notwithstanding a payment on account of the principal had been made, which, however, had not been indorsed on it. Such a certificate is not dishonored until presentment and, therefore, the bar of the statute of limitations was not pleadable. Nat. Bk. of Fort Edward v. The Wash. Co. Nat. Bk., 5 Hun 605 (N. Y.), 1875, is a stronger case than Miller v. Austen, 13 Hav. (U. S. Sup. Ct.) 218, 1851. Brummagins v. Gallant, 29 Cal. 503, 1866, *contra,* in which the court says:

"The differences between a certificate of deposit and a promissory note are merely formal. In substance and legal effect the two instruments are the same: In the former, notwithstanding its name and the phraseology in which the consideration is expressed, it must be regarded and treated as a promissory note payable on demand".

Tripp v. Curtennis, 36 Mich. 494 (1877), in accord with the last case, holds that a certificate of deposit on demand is in effect, a promissory note payable on demand to be governed by the same principles, and that both require that demand be made within a reasonable time. Here are two opposite views on this important question. It is admitted that bank bills or notes continue good until demand be made for their payment, whether at common law or by statute, as in Michigan. In Tripp v. Curtennis, the learned court gives no explanation why certificates of deposit should not be allowed to circulate as negotiable instruments of commerce. To be sure the court said:

"Certificates of deposit are not intended for long circulation or for more than a temporary convenience, and as a substitute for a draft or a certified check".

But it does not appear that any inquiry was made as to what is the custom of merchants in this respect, and it cannot be claimed that courts have judicial knowledge that

certificates of deposit are not intended for long circulation, etc. Is there any justice in a rule under which a man who invests his money in a certificate of deposit and lets the matter rest for more than six years without demanding payment thereby loses his principal?[4]

Certificates of Deposit Must Be Presented Before Action. Based upon the fact that certificates are promises to pay upon return of the certificate it has been held that the statute of limitations begins to run only from the time that demand is actually made, in Fells Point Sgs. Inst. v. Weedon, 18 Md. 320, 1862.[5]

When a Certificate is Overdue. Certificates of deposit, like bank notes, are overdue only after demand.[6] The same rule in accordance with the custom of merchants should have been applied in the case of promissory notes payable on demand. N. I. L. § 131 provides that when an instrument (meaning a bill or a note) is payable on demand, presentment must be made within a reasonable time after its issue, leaving the question of what is reasonable time for the determination of the court upon the facts of the particular case.

There may be something in a certificate of deposit that gives warning as to the time when it will become overdue, even when no fixed date of maturity is stated. Thus, in Kirkwood v. First Nat. Bk. of Kirkwood, 40 Neb. 484, 1894, the certificate of deposit was as follows:

"This certifies that Miss Rose Kirkwood has deposited in this bank three thousand dollars ($3,000) payable to the order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent if left six months; no interest after six months".

[4] See Payne v. Gardiner, 29 N. Y. 146, 1864.

[5] See also Bellows Falls Bank v. Rutland Bank, 40 Vt. 377; Howell v. Adams, 68 N. Y. 314, 1877; Smith v. Steen, 38 S. C. 361, 1892; Telford v. Patton, 144 Ill. 611, 1892.

[6] Nat. Bk. of Fort Edward v. Wash. Co. Nat. Bk., 5 Hun. 605 (N. Y.), 1875.

The Court said:

"We think the instrument should be treated, so far as ascertaining the rights of purchasers, as one payable on or before six months after date; or if not that, then, from the peculiar nature of the contract, six months after date should be treated as the reasonable time within which it should be presented, and a purchaser, taking it within that period, should be considered as a purchaser before maturity", implying that after six months it was overdue.

But as the certificate read "payable . . . on return of this certificate properly indorsed", it is difficult to see how it became due before it was returned properly indorsed. It seems probable that the court was misled by what had become acknowledged law, although erroneously, if the custom of merchants be followed, that is, that a note payable on demand can be sued upon without demand, because suit brought is in itself demand when it said (p. 494), citing even so eminent an authority as Daniel on Negotiable Instruments, § 783:

"There could be no doubt that if the certificate had provided simply for payment upon presentment properly indorsed, it would be in effect a promissory note payable on demand with notice at the latest after the lapse of a reasonable time for presentment".

The court was evidently trying to follow "an anomalous doctrine" as Ames calls it.[7] The whole of the decision is interesting, and incidentally it illustrates the advantages of a system of practice that has abolished the formal separation of law and equity.[8] It is, therefore, well settled that a bank issuing a certificate of deposit in the usual form (payable upon return of this certificate, properly indorsed,) continues indefinitely liable thereon, until presentment and demand for payment be made.

The same principle was applied in Girard Bk. v. Bk. of Penn Township, in which a check drawn October 7, 1852,

[7] Ames, Cases on Bills and Notes, 793.

[8] See also McGough v. Jamison, 107 Pa. 336, 1884; Towle v. Starz, 69 N. W. 1098 (Minn.), 1897.

and certified, was not presented for payment until September 3, 1859: meanwhile, on the 10th of October, 1854, the bank paid the money to the original depositor, taking his bond of indemnity against the check. It was held, in an action upon the certified check, that the holder was not barred by his delay in making demand for payment, and that the taking of the indemnity was a distinct acknowledgment that the money then remained in bank to the credit of the holder of the certified check.

It is true that if an ordinary promissory note is made payable on demand, no presentment was necessary, but a right of action accrues and the statute of limitations begins to run from the moment of issue,[9] instead of beginning to run from the moment of demand for payment. But as Ames says,[10] the courts, "shrinking from the logical results of their anomalous doctrine, have declined to apply it to bank notes or to certificates of deposit".

§ 79. Negotiability. It being now settled law that certificates of deposit are negotiable promissory notes, it follows that they stand on the same footing as bills and notes with regard to the rights of holders and indorsers;[11] following similar erroneous opinions as to promissory notes, it was held that a certificate of deposit, payable in *current funds* is non-negotiable.

The negotiability of a certificate of deposit is not impaired by the fact that it must be surrendered upon payment.[12]

The fact that the holder of a certificate of deposit knew that the person to whom it was given had no deposit with the bank issuing the certificate and that it was issued simply for his accommodation, is no defense to an action thereon.[13]

A certificate of deposit dated August 8, 1882, payable to the order of the depositor on the return of the certificate,

[9] Norton v. Ellam., 6 L. J. R. U. S. Ex. 121, 1827; 2 M. & W. 461 s. c.

[10] 2 Cases on Bills and Notes, 793.

[11] Kilgore v. Bulkley, 14 Conn. 362, 1841; Mills v. Barney, 22 Cal. 240, 1863; Johnson v. Henderson, 76 N. C. 227, 1877.

[12] Read v. Maxim Bk. 59 Hun. 578 (N. Y.) 1891.

[13] The Holland Trust Co. v. Waddell, 75 Hun. 104 (N. Y.), 1894.

was lost September 16, 1882, after indorsement. It was held that it was overdue when lost, and the depositor could demand his note without furnishing indemnity to the bank, since a finder could not be regarded as a *bona fide* holder.[14] Was this decision right?

In Brunmagim v. Tallant, 29 Cal. 503, 1866, it was held that inasmuch as in substance and legal effect a certificate of deposit and a promissory note are the same, the statute of limitations begins to run against both, when payable on demand, from their date, without demand. The imperfect report of the case does not show whether the certificate contained the usual provision requiring its return when paid.[15] The court seemed to think the rule would be the same in either case.

"The fact that a certificate is given on a deposit being made payable on the return of the certificate, instead of leaving the deposit subject generally to check or draft, does not change the reason of the rule that the banker must first be called upon for payment before an action can be maintained. It would be unjust now to make a distinction between the cases and sustain the defense of the statute of limitations, in cases like this, where parties have relied upon the doctrine announced in the cases cited".

[14] Citizens Nat. Bk. v. Brown, 11 Wkly. Law Bul. 220, affirming (Sup. Ct. Gen. 1883) 9 Wkly. Law Bul. 361.

[15] *Contra*, see Howell v. Adams, 68 N. Y. 314, 1877.

CHAPTER X

NEGOTIABLE INSTRUMENTS AS SPECIALTIES

§ 80. Two Classes of Specialties. The sharp distinction between negotiable instruments of the law merchant and contracts suable upon in *assumpsit* under the common law, may be best grasped and retained in memory, by a little study of the law of specialties. The subject is learnedly and convincingly treated by Dean Ames in his Index-Digest to his Cases on Bills and Notes, to which the student is referred and which is here followed.

The term *specialty* is applied to an instrument which becomes effective by the mere fact of its formal execution. There are two classes of specialty contracts in the English law—common law specialties and mercantile specialties. The first class includes bonds and covenants, that is, instruments under seal; the second class includes bills and notes, and policies of insurance and possibly other mercantile instruments (such as negotiable warehouse receipts; negotiable bills of lading; negotiable bills of sale, etc.).

There is a prevalent notion traceable to an opinion given in the House of Lords in 1778 in the case of Rann v. Hughes, 7 T. R. 350, n., that only contracts under seal can be specialties, all other contracts, whether written or oral, being merely simple contracts. The fallacy of this notion is easily demonstrable, by an examination of the resemblances between bills and notes and instruments under seal, on the one hand, and the differences between bills and notes and simple contracts, on the other hand, in those points in which specialties and simple contracts most strikingly differ from each other.

Let us consider briefly some of the reasons presented by Dean Ames for this view.

§ 81. Who May Be Sued on a Negotiable Instrument. An unnamed principal may sue or be sued upon a simple

contract, but no one not named or described as a party to a negotiable instrument can maintain an action upon it as plaintiff.[1] At p. 676, Prentiss J., said:

"In suits in the courts of the United States as laid down in Swift v. Tyson, 16 Pet. 1, the true interpretation and effect of contracts and other instruments of a commercial nature are to be sought, not in the decisions of the local tribunals, but in the general principle and doctrines of commercial jurisprudence. Upon the whole it appears to me that the true rule of law, as deducible from the adjudged cases, American as well as English, is that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appear upon its face to be a party to it. A promissory note, according to the expression of very great judges, partakes in some measure of the nature of a specialty, importing a consideration, and creating a debt or duty by its own proper force. Being assignable and passing by mere indorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing: for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities and on these considerations, that it is distinguished from written simple contracts in general, and subject to a different rule".

Neither as a plaintiff nor defendant can one not a party to the instrument be a party litigant thereon. In Siffkin v. Walker, 2 Camp. 308, 1809, Lord Ellenborough said, "How can I say that a note made and signed by one in his own name, is the note of him and another person, neither mentioned nor referred to?"[2] In Beckham v. Drake, 9 M. & W. 79, at 96, 1814, Parke P., one of the most famous of English judges, said:

"The case of bills of exchange is an exception, which stands upon the law merchant: and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the par-

[1] Grist v. Backhouse, 4 Dev. & Bat. 362, 1839; Bk. of the U. S. v. Lyman, 20 Vt. 666 (U. S. C. Ct.), 1848.

[2] Arnold v. Stackpole, 11 Mass. 27, 1814; Bedford Co. v. Covell, Met. 442, 1844.

ties named in the instrument by their name or firm be made liable to an action upon it."

This principle has been adopted in N. I. L. § 37. Two cases have so far arisen under this section, Swenson v. Stolz, 78 Pac. 999 (Wash.), 1904, and Seattle Shoe Co. v. Packard, 86 Pac. 845 (Wash.), 1906.

§ 82. Negotiable Instrument Treated as Specialty in Pleading. A declaration upon a simple contract alleges a promise by the defendant, and some act or forbearance by the plaintiff at the defendant's request, as the consideration for that promise. A count upon a bill states neither promise nor consideration, but alleges, like a count upon a covenant, simply the execution of the instrument by the defendant.[3]

The failure of the judges to recognize the custom of merchants as the source of authority in cases brought on negotiable instruments, a failure continuing to a certain extent, to the present day, is shown by the following extracts. In Williams v. Cutting, 2 Ld. Raym. 825, 1703, Holt C. J., said:

"As to the question whether the declaration on the note could be supported, that he has proposed it to all the judges, and that they were all of opinion that a declaration upon the custom of merchants upon a note subscribed by the defendant to the plaintiff for so much money was void, for it tended to make a note amount to a specialty".

In Potter v. Pearson, 2 Ld. Raym. 759, 1703, the court said that the alleged custom by which the maker of a promissory note was bound to pay it, was a void custom, since it binds a man to pay money without a consideration.

The normal form of action upon a negotiable instrument is a special action upon the case founded upon the custom of merchants, just as covenant is the appropriate remedy upon an instrument under seal, and *assumpsit* is the appro-

[3] Starke v. Cheesman, L. Rayd 538, 1700, and the note to this case, 2 Ames, Cases on Bills and Notes, 525; Simmonds v. Parminter, 1 Wils. 185, 1741; 2 Chitty Pl. 7th ed. 100 *et seq.* See also Lord Halls opinion in Clerke v. Martin, 2 Ld. Raym 757, 1703, already cited.

priate remedy upon a simple contract. Although an action of debt cannot be properly brought upon a simple contract unless the defendant has received a substantial consideration, an action may be maintained upon a covenant to pay a sum certain, and upon a negotiable instrument, even though it appears that the defendant has received no equivalent for his signature, as in the case of accommodation paper,[4] in which Tindal, C. J., says:

"When the defendant became a party, as maker, to a promissory note in favor of the plaintiff, he entered into an immediate contract, which raised a privity between the plaintiff and himself, or, in other words, he took the debt on himself".

This overrules Milston's Case, Hardres 485, 1668.[5] The last three cases under this section are Bradley Engineering and Mfg. Co. v. Heyburn, 106 Pac. 170 (Wash.), Jan. 10, 1910; Newman, L. v. Pellerin, 51 S. 70 (La.), Jan. 17, 1910, but without mentioning the N. I. L. which is in force in Louisiana. It is to be regretted that this omission to cite the N. I. L. occurs frequently in the decisions of this State.[6]

The American cases permit an action of debt by any holder against any prior party to the instrument, that is, by the payee against the maker or acceptor.[7] That there were statutes authorizing such suits in these two States, does not militate against the fact that here is evidence that negotiable instruments are treated as specialties. The American cases also permit an action by an indorsee against the drawer or an indorser.[8] The English authorities have limited such actions in debt to cases between a payee and a drawer or maker,[9] or between an indorsee and his immediate indorsor.[10]

[4] Sison v. Kidman, 11 L. J. R. C. P. 100, 1842.

[5] See also N. I. L. § 55.

[6] Morris County Brick Co. v. Austin, 75 At. 550 (N. J.), Feb. 21, 1910.

[7] Hollingsworth v. Milton, 8 Leigh 50 (Va.), 1837; Regnault v. Hunter, 4 W. Va. 257, 1870.

[8] Onondaga Co. Bk. v. Bates, 3 Hill. 53 (N. Y.), 1842.

[9] Bishop v. Young, 2 B. & P. 78, 1800.

[10] Walkins v. Wake, 7 M. & W. 488, 1841.

Upon principle, an action in *assumpsit,* ought not to lie upon a negotiable instrument. But as the courts for a long time allowed plaintiffs to declare in *assumpsit* in cases where originally debt was the only remedy, it was logical to extend the remedy in *assumpsit,* by the same fiction of a promise implied in law, to cases of negotiable instruments.

Even in the use of the action of *assumpsit* there is a contrast between cases on negotiable instruments and those on simple contracts a contrast explicable only by the essential difference in the nature of the two kinds of obligation. It is a general rule that whenever an action of debt will lie upon a simple contract (which is only when the amount is certain) the plaintiff, may, if he prefers, declare in *indebitatus assumpsit.* But a general action in *indebitatus assumpsit* will not lie upon a negotiable instrument.[11] In Lindo v. Gardner, 1 Cranch 343, 1803, it was held in the Supreme Court of the United States that in Maryland even an action in debt will not lie.[12] And of course neither a bill nor a note will support an action on the usual money counts.[13] The American cases to the contrary violate the most fundamental principles of pleading and evidence. See also the note by Dean Ames, 2 Cases on Bills and Notes, 539: The notion repudiated by Littledale J. (in Eales v. Dicker *ut supra* seems to have been founded upon a careless *dictum* by Lord Mansfield in Grant v. Vaughan (3 Burr. 1516, 1764) as follows:

"The objection was to bringing an action upon the note itself, as upon a specialty: but I do not find it anywhere disputed that an action upon an *indebitatus assumpsit* generally for money lent, might be brought on a note payable to one or order. Unreasoning respect for this *dictum* has produced in this country the utmost confusion as to the use of the money counts in action upon bills and notes" (citing the cases).

And again, in a note to Sison v. Kidman, 11 L. J. R. C. P.

[11] Brown v. London, 1 Mod. *285, 1671.

[12] See also Hodges v. Stewart, 1 Sals. 125, 1691, which may be considered as overruled by the statutes 3 & 4 Anne C. O., 1704.

[13] Eales v. Dicker, Moody & Malkin 324, 1829.

100, 1842, on p. 544 of vol. 2 Cases on Bills and Notes, Dean Ames speaks of the reasoning in the American cases there cited, as being incomprehensible. With such fearless criticism of decisions of the highest courts by so eminent an authority, no student need hesitate in following the same course and in using his own reasoning power before accepting any opinion. These cases illustrate also the mischief that has arisen in undertaking to superimpose the rules of common law upon the law of negotiable instruments, instead of following logically the rules established by the custom of merchants.

§ 83. Negotiable Instrument as Merger of a Debt. If a creditor takes from his debtor an instrument under seal on account of his debt, the debt is thereby extinguished or merged in the new security. A negotiable instrument operates in like manner, according to the custom of merchants as a merger of a debt for which it is given.

Although the decisions can be supported only upon the theory that a negotiable instrument is a specialty, the courts have not given full effect to the custom of merchants. Thus, a bill may be given in full satisfaction of a debt,[14] even though the debtor is the only party to it and the bill is for a smaller amount than the original bill.[15] Yet it has been held generally that a negotiable instrument given for a debt is presumptively given only by way of conditional payment, so that if the instrument is not duly honored, the creditor may renounce the security and resort to the original debt, Ward v. Evans, 2 Lord Raym. 928, 1702, in which Holt, C. J., again vented his spleen against following the custom of merchants, saying:

"But then I am of opinion and always was (notwithstanding the noise and cry that it is the use of Lombard street, as if the contrary opinion would blow up Lombard street), that the acceptance of such a note is not actual payment."

[14] Sheehy v. Mandeville, 6 Cranch 253, U. S. Sup. Ct. 1810; Sard v. Rhodes, 1 M. & W. 153, 1836.

[15] Sibree v. Tripp, 15 M. & W. 23, 1846.

Dean Ames adds a note to this case:

"Lord Holt's view has generally prevailed over the custom of merchants and it is well settled that the acceptance by a creditor of negotiable paper made or indorsed by his debtor on account of the claim operates presumptively as a conditional payment or temporary merger of the claim. Accordingly, if the paper is not honored at maturity, action may be brought on the original claim," citing many cases. [16]

This doctrine is not only foreign to the custom of merchants, but it is also inconsistent with the common law principle that a cause of action once suspended is extinguished. N. I. L. § 51 rightly construed, puts an end to the many conflicting and discordant decisions on this subject, and the cases that have arisen under this section have already been referred to in other sections.

As this point is now settled by the principle adopted in § 51, except in those jurisdictions that still persist in following old decisions, although they have adopted the N. I. L., it is only necessary here to refer the inquiring student to 2 Ames, Cases on Bills and Notes: 571, n. 2, where the old decisions, prior to the adoption of the N. I. L., may be found. See also Vancleef v. Therasson, 3 Pick. 12 (Mass.), 1825, in which case the note was made in New York and was lost. The court held that the law of the place where the contract was made (N. Y.) must govern and that under the decisions in that state the note being lost, could not be viewed as an extinguishment of the antecedent debt unless it were so expressly agreed.

§ 84. Negotiable Instrument Valid without Consideration. It is frequently stated in the books that as between the immediate parties to a bill or note, a consideration is necessary to the validity of the obligation. This notion, it is submitted, is erroneous upon principle and also upon the authorities; for although it must be conceded that the courts have sanctioned the defense of absence of consideration in certain cases, these decisions should be regarded

[16] 2 Ames, 2 Cases on Bills and Notes 571, note.

as anomalous exceptions to the rule that a bill, being in the nature of a specialty, is obligatory without a consideration, rather than as illustrations of the opposite doctrine, that a bill being a simple contract, requires a consideration to support it.[17]

It will be found upon consideration of cases that have brought difficulties and contradictions into the law of negotiable instruments, that they are cases that departed from the custom of merchants by attempting to follow the principles of the common law. The result has been to make this branch of law most difficult to master. Let the student always remember that "before legislatures enacted statutes and the courts decided cases which became a part of the written law, the necessities of business and the usages of trade produced a system controlling absolutely commercial intercourse".[18] Let him not hesitate to criticize mercilessly all decisions that ignore the custom of merchants, and let him remember that § 7 provides that in any case not provided for in the N. I. L. the rules of the law merchant shall govern, with its necessary implication, not yet followed in some States that have adopted this law, that in all cases so provided for in the N. I. L. the rules of the law merchant shall govern.

[17] 2 Ames Cases on Bills and Notes 876.

[18] Eaton & Gilbert on Commercial Paper § 2.

EXAMINATION PAPER

LAW OF BILLS, NOTES, AND CHECKS

PART II

Read Carefully: Place your name and full address at the head of the paper. Any cheap, light paper like the sample previously sent you may be used. Do not crowd your work, but arrange it neatly and legibly. *Do not copy the answers from the Instruction Paper; use your own words, so that we may be sure you understand the subject.*

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1. What is "value" or "valuable consideration"?

2. If a negotiable instrument is taken in payment of a debt, is it taken for value, either under the N. I. L. or otherwise? Explain your answer and give your reasons.

3. If a negotiable instrument is taken in conditional payment of a debt, is it taken for value? Why?

4. If a negotiable instrument is taken as collateral security for a debt, is it taken for value? Why? What are the different views that are held on this subject?

5. What is the legal position of one who acquires for value an overdue negotiable instrument?

6. Does a negotiable instrument continue to be negotiable after dishonor? Why?

7. In what respect does a dishonored instrument resemble an ordinary chattel?

8. When is a certificate of deposit overdue?

9. Can suit be brought on a negotiable promissory note payable on demand without first making demand? Why?

10. When is suit barred on a negotiable promissory note payable on demand? Why? State both views.

11. What is "reasonable time" or "unreasonable time" in the law of bills and notes?

12. What negotiable instrument must be protested upon nonpayment at maturity and why?

13. In what case is a promissory note payable in installments overdue?

14. Under what circumstances is a negotiable instrument extinguished?

15. How can suit be brought on an instrument that has been destroyed?

16. What is the legal effect of an alteration in a negotiable instrument? Give examples of material alterations and of immaterial alterations of a negotiable instrument.

17. What is the legal situation of an innocent purchaser for value of a negotiable instrument that has been materially altered after it was issued?

18. What is the effect of a retransfer of a negotiable instrument to the maker or acceptor?

19. What is the liability of the acceptor of a bill of exchange or of the maker of a promissory note?

20. When is presentment of a negotiable instrument necessary?

21. Where must presentment for payment of negotiable instruments be made? Describe the difference in this respect between negotiable instruments and ordinary contracts.

22. What is the obligation of the drawer and of the indorser of a negotiable instrument?

23. What is "notice of dishonor", and when must it be given?

24. When must a negotiable instrument be surrendered to the maker, drawer, or indorser? Why?

25. When must a bill of exchange be presented for acceptance?

26. When must a bill of exchange be presented for payment?

27. What provision does the N. I. L. make as to days of grace?

28. State the rule as to the time of presentment for payment of checks under the N. I. L. and otherwise?

29. What change is made in the N. I. L. as to notice of dishonor? What are the requisites of such a notice?

30. What is a certified check?

31. What is the legal effect of the certification of a check?

32. How long will a certified check remain valid? Why?

33. What change has been made by courts in their attitude towards the negotiability of certificates of deposit?

34. When can suit be brought on a certificate of deposit?

35. What is a specialty?

36. Who may be sued on a negotiable instrument? What is the normal form of action on a negotiable instrument?

37. How are negotiable instruments considered in framing a declaration on them? Why?

38. What departure has been made from principle in bringing actions on negotiable instruments? Explain the reasons for this departure.

39. What reason is there why, on principle, an action in assumpsit ought not to lie on a negotiable instrument?

40. Does a negotiable instrument given for a debt operate as extinguishment or merger of the debt? Why? State what this tends to prove.

41. As between the immediate parties to a promissory note, state the difference between the law merchant and the common law? Which is correct on principle in the case of negotiable instruments and why? State your reasons.

After completing the work, add and sign the following statement:
I hereby certify that the above work is entirely my own.
(Signed)